

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability
company,) CASE NO. 3:17-cv-05760-BHS
)
Plaintiff,) PLAINTIFF HP TUNERS LLC'S
) RESPONSE TO DEFENDANTS'
vs.) MOTION TO STRIKE PLAINTIFF'S
) SUPPLEMENTAL TRIAL BRIEF
KEVIN SYKES-BONNETT and SYKED)
ECU TUNING INCORPORATED,))
Washington corporation, and JOHN)
MARTINSON,)
Defendants.

NOW COMES, Plaintiff HP Tuners, LLC ("HPT" or "Plaintiff"), by its attorneys, for its
Response to Defendants' Motion to Strike (the "Motion") Plaintiff's Supplemental Trial Brief on
Trade Secrets and Misappropriation, states as follows:

**A. Introduction – The Supplemental Trial Brief Acknowledges this Court's
Direction that Plaintiff Further Identify the Trade Secrets at Issue**

The subject Motion (Dkt. 238) filed by Defendants, Kevin Sykes-Bonnett ("Sykes-
Bonnett"), Syked ECU Tuning, Incorporated ("Syked Tuning") and John Martinson
("Martinson") seeks to strike Plaintiff's Supplemental Trial Brief on Trade Secrets and
Misappropriation (the "Supplemental Brief") (Dkt. 236). Defendants' seek to invoke FRCP

1 12(f) to allege that the Supplemental Brief may be stricken by the Court as a “redundant,
2 immaterial, impertinent, or scandalous matter”. Fed.R.Civ.P. 12(f).

3 Contrary to Defendants’ characterization, Plaintiff’s Supplemental Brief is a material and
4 pertinent submission made in direct response to inquiries of this Court. It also reflects exactly
5 what Plaintiff previously indicated was forthcoming in the Court’s requested briefing on the
6 parties’ motions to seal (Dkt. 233, fn. 2). Moreover, it breaks no new ground in the case and
7 merely provides the clarity sought by the Court as to which HPT trade secrets are at issue in this
8 matter. There is no unfair surprise or prejudice to any Defendant as to these matters which have
9 been fully flushed out in prior discovery and briefs, and do not represent “another bite at the
10 apple” (cf. Motion, ¶4).

11
12 On October 9, 2019, this Court entered its “Order Granting Plaintiff’s Motion for Leave
13 to Supplement, Striking Pretrial Conference and Trial Date, and Requesting Joint Status Report”
14 (Dkt. 225). This Court concluded that its review of the trial briefs established that issues needed
15 to be resolved before proceeding to trial and identified claims the parties seemed to agree were
16 involved in this matter, one of which was HPT’s allegations that Defendants copied or
17 incorporated HPT’s trade secrets into Syked Tuning’s software (Dkt. 225 at 2). The Court noted
18 that HPT had “high-level general accusations that Defendants copied HP Tuner’s trade secrets ...
19 without specifically identifying what trade secrets were copied”. Id., citing Dkt. 217 at 15-16.
20 This provoked a query from the Court that “if HP Tuners intends to submit any additional
21 evidence of copying, it must disclose to Defendants and the Court exactly what secrets were
22 copied”. Dkt. 225, at 3.

23
24 On October 17, 2019, this Court entered its “Order Denying in Part Plaintiff’s Motion to
25 Seal, Granting in Part Defendants’ Motion to Seal, Reserving Ruling in Part on the Remainder of

1 the Parties Motions to Seal and Requesting Supplemental Briefing” (Dkt. 229). In this order the
2 Court reiterated similar observations and queries that “HP Tuners provides only high-level
3 general arguments that the deposition contains confidential business and trade secrets” and that
4 further briefing in the context of the depositions addressed therein may “shed some light on what
5 HP Tuners alleges are its actual trade secrets”. Dkt. 229 at 2 citing Dkt. 205 at 3. The Court
6 ordered that HPT may file a supplemental brief on the pending motions to seal. Dkt. 229, at 3.

7
8 On November 1, 2019, Plaintiff filed its “Second Supplemental Brief Regarding Motions
9 to Seal” as so ordered (Dkt. 233). Plaintiff stated therein that:

10 HPT is mindful of the Court’s comments in its recent Orders (Dkt. 225 and Dkt.
11 229) regarding the issue of what trade secrets are at issue here. HPT will be filing a
12 Supplemental Trial Brief to specifically address this issue. However, for purposes
13 of this motion, Mr. Prociuk’s deposition testimony (and certainly the identified
14 portions of his testimony as detailed in the Prociuk Decl.) constitutes private,
15 sensitive, confidential and, in certain instances, trade secret, information of HPT
16 that would harm HPT’s competitive standing in the industry if made publicly
17 available, and which is primarily of interest to competitors, not the public. As
18 demonstrated herein, the Motions to Seal should be granted in this regard.

19 Dkt. 233, fn. 2 (emphasis supplied)

20 The above brief was more narrowly tailored to the issue at hand – sealing portions of the
21 deposition transcript of Keith Prociuk. However, the Court had now issued two (2) orders more
22 broadly articulating that Plaintiff provide a greater degree of specificity for the Court as to the
23 content of its trade secrets at issue in this matter. In order to flush this out more fully as directed
24 by the Court, Plaintiff indicated its intent to do so and followed up accordingly with the filing of
25 the Supplemental Trial Brief.

B. The Supplemental Trial Brief Serves to Provide Greater Specificity as to Trade Secrets at Issue in this Matter and Which Were Previously Addressed in Plaintiff's Trial Brief

On October 8, 2019, HP Tuners filed its trial brief (the "Trial Brief") (Dkt. 217) explaining at the outset that the subject lawsuit was one for "misappropriation of confidential proprietary information, including trade secrets ...". *Id.*, at 1. HPT delineated the valuable trade secrets it alleged as having being misappropriated by Defendants as follows:

- VCM Suite Software;
- Parameters List;
- Source Code;
- MPVI Communications Protocol;
- Communication Algorithms; and
- Application Key Generator.

Dkt 217, at 2-3, 6-8.

After describing each categorical subset of trade secret(s), HPT also explained the means and measures undertaken to protect its trade secrets, and how Defendants copied or otherwise misappropriated those trade secrets. Dkt 217, at 8-15. Plaintiff then set forth an analysis of liability (Dkt. 217, at 18-33) and damages (Dkt. 217, at 33-37) vis-à-vis each statutory and common law cause of action.

Having opined that Plaintiff's had only generally described the trade secrets at issue in this matter, the Court invited Plaintiff to provide further detail and specificity on this issue. Plaintiff's Supplemental Brief is exactly this exercise undertaken in respectful response to the Court's comments and not what Defendants hyperbolically characterize as "a thinly disguised

request for reconsideration of this Court’s Orders”, “a wholesale revision of its legal theories”, or “arguments never made before”. Dkt 238, ¶3. In actuality, the Supplemental Brief revises nothing and presents nothing novel. To the extent it is guilty of any “redundancy” it is only by making more salient the material matters as to which this Honorable Court has made genuine inquiries. The Supplemental Brief is what it purports to be, stating in introduction that:

In response to the Court’s comments in its recent Orders (Dkt. 225 and Dkt. 229), HPT submits this Supplemental Trial Brief on Trade Secrets and Misappropriation to supplement its prior submission and further address the nature of the trade secrets and misappropriation at issue in this matter.

Dkt. 236, at 1.

At the outset, Plaintiff reviews the statutory definition(s) of “trade secret” which appeared in the Trial Brief. Compare Dkt. 236, at 2-3 with Dkt. 217, at 20-27. Thereafter, Plaintiff affords greater detail to the previously identified trade secrets as requested.

1. VCM Suite Software

The first trade secret specifically discussed in Plaintiff’s Trial Brief is its VCM Suite Software. Dkt. 217, at 3. Plaintiff stated that “with regard to HPT’s claims sounding in trade secret misappropriation, Defendants admit to receiving and possessing HPT’s VCM Suite Software, source code, key generator and MPVI communication protocol documents” and that:

... evidence will show that HPT’s source code, VCM Suite Software, HPT’s parameters list, HPT’s implementation of algorithms, HPT’s key generator, HPT’s MPVI communication protocol documents and various HPT files, programs, documents, materials and information contained on the Flash Drive (which Sykes-Bonnett destroyed in the midst of these proceedings) constitute trade secrets of HPT.

Id.

Additional references to this software and Defendants’ misappropriation appear

1 throughout the Trial Brief but are elaborated on further, as requested, in the Supplemental Brief.

2 First, it is reiterated that Sykes-Bonnett admitted disassembling HPT's software for the
3 development of his own. Dkt. 236, at 5. Second, Sykes-Bonnett admitted to the destruction of a
4 USB drive possessing Plaintiff's information and was used in the development and creation of
5 Defendants' software. *Id.* HPT is entitled to the adverse inference that Defendants'
6 misappropriated, used and copied HPT's trade secrets which were contained on the destroyed
7 flash drive. Dkt. 236, at 10. Plaintiff detailed in its Supplemental Brief the immense advantage
8 to Defendants of having access to the files on the flash drive, with it having taken HPT over 15
9 years to develop the features and capabilities of the VCM Suite software and is the result of tens
10 of thousands of man hours in development and research. *Id.* Defendants, however, simply took
11 the final result and implemented it into their product without expenditures or effort.
12

13 2. Parameters List

14 The Parameters List (specifically its E38 parameters) is another trade secret Plaintiff has
15 previously identified as having been misappropriated by Defendants. Dkt. 217, at 6. In its Trial
16 Brief, Plaintiff stated that this list "contains pairs of names (of parameters) and an associated
17 value for each name. HPT has created names for the parameters that are readily understandable
18 and usable by a user. HPT's Parameter List is critical to making its product user friendly to its
19 customers as they modify/tune their vehicles. The Parameters List is confidential, proprietary and
20 trade secret intellectual property of HPT." *Id.* Plaintiff previously alleged that Sykes-Bonnett
21 possessed and accessed the confidential and proprietary parameters list. *Id.*, at 10, 14.
22

23 The Supplemental Brief provides more detail as to this allegation, first noting that Sykes-
24 Bonnett admitted to disassembling HPT's software and stealing HPT's parameters names for
25 inclusion in Defendants' software. Dkt. 236, at 5. The Supplemental Brief concludes with a

1 section entitled “Sykes-Bonnett’s Wrongful Acquisition and Use of HPT’s Parameters List”
2 primarily highlighting what previously appeared in the Trial Brief and stating that Defendants
3 stole and incorporated this into their software. *Id.*, at 10, 15.

4 3. Source Code

5 Defendants’ misappropriation of Plaintiff’s source code is at the heart of this case. As
6 Plaintiff’s original Trial Brief detailed:

7 While certain executable files are made available to HPT customers, the source
8 code that creates those executable files as well as the source code that drives the
9 HPT interfaces and the software residing on HPT’s systems is proprietary and
10 fundamental to HPT’s business. By analyzing the source code one can understand
11 the details regarding how HPT’s software functions and how it could potentially be
12 modified or replicated/mimicked. HPT’s source code is confidential, proprietary
13 and trade secret intellectual property of HPT. Defendants possessed HPT’s source
14 code specifically including but not limited to HPT’s VCM Suite software source
15 code for version 2.23 and the source code for HPT’s MPVI firmware.

16 Dkt. 217, at 6-7.

17 Plaintiff has alleged that it took reasonable measures to protect its source code, that
18 Sykes-Bonnett accessed and possessed the confidential and proprietary source code to develop
19 Defendants’ software and distributed it to third parties for profit. *Id.*, at 9-11, 14-15.

20 The Supplemental Brief provides more specificity concerning these issues. First,
21 Plaintiff specifies that software source code can be a trade secret and its use to create a derivative
22 program constitutes misappropriation of trade secrets. Dkt. 236, at 4 citing *Computer Associates*
23 *Int’l v. Quest Software, Inc.*, 333 F. Supp. 2d 688, 691 (N.D. Ill. 2004). However, proof of
24 copying source code (or review) is not even necessary to establish trade secret misappropriation.
25 Dkt. 236, at 6 citing *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.*,

732 F. Supp. 370, 377 (S.D.N.Y. 1989), aff'd 920 F. 2d 171 (2d Cir. 1990). In this case, specific copying has been identified and/or admitted. Moreover, Sykes-Bonnett admittedly used HPT's source code in the development of Defendants' software, disclosed that source code to third parties through Facebook Messenger, and destroyed a flash drive used to create Defendants' source code (Dkt., at 4-5, 11) (as to which HPT is entitled to an adverse inference that Defendants' misappropriated, used and copied HPT's source code¹). Plaintiff's Supplemental Brief provides specific examples of how Defendant actively used HPT's code to develop their own source code, such as: (1) Sykes-Bonnett paying Christopher Breton-Jean to patch a particular version of HPT's software including support for the ZF8 transmission; and (2) Martinson using HPT cables to "get the writing working" in Defendants' software. Dkt. 236, at 6.

As to the matter of the destroyed flash drive, the Supplemental Brief gives additional specifics as to Defendants' misappropriation of source code and software for its own software development. Dkt. 236, at 7-10. Again, these are not new allegations or content from Plaintiff but rather more detail in response to the Court's request. In this vein, the Supplemental Brief explains specific source code files, or files used to develop or implement source code, and how they were misappropriated by Defendants, such as: "cCable.cs", "cMPVI.cs", "MPVI Protocaol.doc", "Interface Reporgramming.doc", "cVehicle.cs", "cController.cs", and the VCM Suite 2.23 source code. *Id.*

4. MPVI Communications Protocol

The MPVI Communication Protocol was originally described by Plaintiff as a confidential, proprietary and trade secret developed by HPT that enables the VCM Editor

¹ Dkt. 236, at 10.

1 software (downloaded from HPT’s website) to communicate to the HPT interface (e.g. the
 2 MPVI) and the firmware contained therein to communicate with the vehicle. The interface and
 3 vehicle utilize different means of communicating and the protocol enables the two to
 4 communicate despite this difference. Dkt. 217, at 7.

5 To provide more clarity, the Supplemental Brief reiterated this description and explained
 6 further that the Defendants’ source code interfaced with HPT’s hardware. The variable ftStatus
 7 used by Defendants in their cable communication file “Cls_Cable_Communication.cs” in the
 8 repository dated 2017-05-16 contains direct reference to the HPT hardware:
 9

```
10 ftStatus = _cableChannel.OpenBySerialNumber("HPT00021B"); //ftStatus =  

  _cableChannel.OpenBySerialNumber(ftdiDeviceList[1].SerialNumber)
```

11 Dkt. 236, at 11.

12 Explaining further, Plaintiff noted that the above code above shows that connections it
 13 should be able to manage include connections to hardware labeled “HPT00021A” and
 14 “HPT00021B”. To interface or communicate with HPT hardware would have required use of
 15 HPT’s communication protocols. Therefore, to conduct these communications that Defendants
 16 software was able to manage implies that Defendants were using HPTs confidential and
 17 proprietary communications protocols, which are its trade secrets. *Id.* A description HPT’s
 18 “MPVI Protocol.doc” and Defendants’ copying and pasting this into their code has provided
 19 additional detail to HPT’s allegations regarding misappropriation of this trade secret. *Id.*, at 8.
 20

21 5. Communication Algorithms

22 Plaintiff’s Trial Brief stated that it expended great time, cost, and effort to determine
 23 certain communication algorithms necessary to initiate communication between various
 24 automobile’s computers and an external interface (like the HPT interfaces known, for example,
 25

1 as an MPVI) through which one could communicate to those computers. These algorithms are
2 akin to an “electronic handshake” that is required by an automobile’s computer for any further
3 communication to occur. The specific implementation of these algorithms is an HPT trade secret
4 misappropriated by Defendants. Dkt. 217, at 7-8, 14, 16.

5 In response to the Court’s desire for more clarity on HPT’s trade secrets, Plaintiff has
6 now elaborated as to Defendants’ use of HPT’s implementation of seed and key, checksumming
7 methods and algorithms. *Id.*, at 12-13. The Supplemental Brief explains that Defendants’ source
8 code contained similarities in the access control methods found with those in HPT’s source code.
9 By way of example, Plaintiff explains the process by which specific files are manipulated and
10 written, and that an unnatural yet identical ordering and identical seed and key method appears in
11 both Plaintiff’s and Defendants’ code. *Id.*, at 13. Despite Defendants assertion that these
12 seed/key algorithms and checksums algorithms are intellectual property of vehicle manufacturers
13 mimicked equally by both Plaintiff and Defendants, Plaintiff describes how this is not the case
14 and that the specific algorithms at issue were developed and implemented by HPT without
15 having any inside information from vehicle manufacturers. Defendants copied these from
16 Plaintiff and integrated same into Defendants’ software, with Plaintiff specifically identifying for
17 the Court the Dodge, Ford, and GM applicable seed/key algorithms and checksumming which
18 Defendants misappropriated, along with the basis for the allegations. *Id.*, at 13-14.

21 6. Application Key Generator

22 The final trade secret category previously identified by Plaintiff is an application key
23 generator, which is among the software residing on HPT’s servers. Dkt. 217, at 8. When a
24 customer wishes to add credits to their interface (to license more vehicles), they purchase credits
25 from HPT’s website specifically for their interface. Credits are delivered to the customer via an

1 application key that is created and sent from the application key generator. The application key is
2 a 35-character string, which includes a variety of secure information including the interface ID
3 and the total credit quantities purchased to date. The application key utilizes secure validation
4 measures to prevent fraudulent reproduction. The application key generator is an HPT trade
5 secret misappropriated by Defendants. *Id.*, at 11-15.

6 As to this specific trade secret, the Supplemental Brief highlighted the prior description
7 and Sykes-Bonnett's dissemination application keys to third parties. *Id.*, at 14-15. Sykes-
8 Bonnett has admitted to disseminating application keys to third parties for profit. *Id.*, at 14.

9 **C. The Parties' Pending Agreed Private Mediation**

10 Counsel for the parties have recently agreed to submit to private mediation conducted by
11 the Honorable James Ware (Retired) on December 6, 2019 in Seattle, Washington. For
12 Defendants' Motion to suggest that the Supplemental Brief "now calls into serious question the
13 likelihood of achieving a settlement" is a nonsensical red herring. See Dkt 238 at ¶4. The
14 parties' agreement to participate in mediation was, and remains, an entirely mutual and voluntary
15 venture. Plaintiff and any Defendant are free to negotiate or achieve a settlement (or not) of their
16 own free will at any time, for any reason, and by any means or procedure. Plaintiff continues to
17 welcome and encourage any and all resolution efforts yet will not afford credibility to the
18 assertion that its provision of clarity as requested regarding the trade secrets at issue determines
19 whether good faith settlement participation occurs.

20 **D. Conclusion**

21 In presenting its Motion pursuant to FRCP 12(f), Defendants claim that the matters
22 submitted by Plaintiff to this Court are redundant, immaterial, impertinent, or scandalous.
23 Defendants also raise an implication of prejudice resulting from the introduction of novel matters
24
25

1 and or revised legal theories. Dkt. 238, at ¶3. At most, Plaintiff concedes an element of
 2 redundancy but only to further detail the issues which it has presented in prior pleadings,
 3 discovery and briefs. This Court has construed Plaintiff's allegations concerning its trade secrets
 4 as more general than specific and, in that regard, sought greater specificity. To comply with the
 5 Court's inquiry, Plaintiff has both repeated prior submissions to highlight the Plaintiff's trade
 6 secrets and also elaborated as appropriate in the Supplemental Trial Brief. This response to the
 7 Court, as demonstrated herein, is material, pertinent, and far from "scandalous" or new.
 8 Moreover, Plaintiff's simple highlighting, illustration, and affording greater detail to the matters
 9 at issue throughout the history of this case has resulted in no prejudice whatsoever to any
 10 Defendant, particularly where these are matters which have been at issue since the inception of
 11 this matter and throughout discovery and there is no currently scheduled trial date in this case.
 12

13 WHEREFORE, HP TUNERS, LLC, respectfully prays for an order denying Defendants'
 14 Motion To Strike Plaintiff's Supplemental Trial Brief, and for such other and further relief as this
 15 Court deems necessary and appropriate.

16 Dated this 25th day of November, 2019

Respectfully submitted,

17 s/ Andrew P. Bleiman
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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2019, I caused the foregoing to be electronically with the Clerk of Court using the CM/ECF system which will electronically send Notice to all Counsel of Record.

MARKS & KLEIN

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